United States Department of Labor
Board of Alien Labor Certification Appeals
Washington, D.C. 20001

'Notice: This is an electronic bench opinion which has not been verified as official'

Date: August 25, 1997

Case No. 95 INA 660

In the Matter of:

ANTARES CHARTERING & SHIPPING, INC.,
Employer

on behalf of
SLOBODAN TODOROVIC,
Alien

Appearance: M. A. Young, Esq., of Studio City, California.

Before : Holmes, Huddleston, and Neusner
Administrative Law Judges

FREDERICK D. NEUSNER
Administrative Law Judge

DECISION AND ORDER

This case arose from a labor certification application that was filed on behalf of SLOBODAN TODOROVIC (Alien) by ANTARES CHARTERING & SHIPPING, INC., (Employer) under § 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. § 1182(a) (5)(A) (the Act), and the regulations promulgated thereunder, 20 CFR Part 656. After the Certifying Officer (CO) of the U.S. Department of Labor at New York, New York, denied the application, the Employer and the Alien requested review pursuant to 20 CFR § 656.26.[1]

Statutory Authority. Under § 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified, and available at the place

[1]The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File (AF), and any written argument of the parties. 20 CFR § 656.27(c).

where the alien is to perform such labor at the time of the application; and (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed. Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.[2]

STATEMENT OF THE CASE

On October 25, 1993, the Employer, which is an international shipping company, applied for labor certification on behalf of the Alien for the position of Shipping Supervisor. The Employer offered a salary of $2,975.00 a month for this position which requires forty hours a week with no overtime. The qualifying requirements were six years of high school and two years of experience in the job offered or two years experience in the related occupation of shipping operation manager. AF 04. The Alien's experience was as a shipping operation manager for an international shipping company from 1971 to 1986, and from 1986 to the date of application he was "president and independent consultant" of a firm in the "international forwarding and freight trade." AF 01.

Notice of Findings. On March 26, 1995, the Certifying Officer's (CO) Notice of Findings (NOF) denied certification, subject to rebuttal. The CO found that four U.S. applicants were qualified for the position, but were rejected for reasons that were neither lawful nor job-related. AF 125. The qualified U. S. applicants included Anthony A. Cerami, who had a bachelor's degree in Transportation Management, a master's degree in management, as well as numerous courses and certificates in international transportation and trade with an extensive work history in international shipping operations. The CO said the Employer could rebut the findings by documenting the validity of his actions in rejecting the U.S. applicants. AF 125.

Rebuttal. Employer's May 1, 1995, rebuttal offered evidence regarding all four U. S. Applicants. Inter alia, the Employer alleged that U. S. applicant Cerami said in his interview that he was not interested in this position at the wages offered. AF 145.

Final Determination. The CO's Final Determination of May 25,

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[2]Administrative notice is taken of the Dictionary of Occupational Titles, published by the Employment and Training Administration of the U. S. Department of Labor.

1995, denied certification. AF 148. While finding that Employer had established lawful job-related reasons for rejecting three of the U.S. applicants named in the NOF, the CO concluded that the Employer had failed to prove the it had rejected Mr. Cerami for reasons that were lawful and job-related. The CO found that Mr. Cerami was willing to accept Employer's job offer at a lower salary because his current employment was temporary in nature. AF 148. As a result, the CO denied certification on grounds that the Employer had failed to demonstrate lawful job-related reasons for rejecting this U. S. applicant.

Appeal. The Employer thereupon requested review on June 23, 1995. AF-161.

DISCUSSION

If U.S. workers have applied for the job opportunity and are rejected, 20 CFR § 656.21(b)(6) requires the employer to prove that their rejection was for reasons that were lawful and job-related. In this case the CO found that Mr. Cerami, one of the four U. S. applicants, was qualified, willing, and able to perform the job opportunity. In its request for review, however, the Employer contends that Mr. Cerami rejected the job offer in the interview because the salary offered was too low. Employer did not submit any evidence to support its assertion that it offered the job to Mr. Cerami and Mr. Cerami rejected the job offer.

In recounting the interview with Mr. Cerami the Employer observed that he was currently earning a salary of $39,000.00 per year. Noting that this U. S. worker was seeking a position with a large corporation, the Employer concluded with the following comment,

> Unfortunately, we are unable to offer him $39,000.00 per year as a starting salary nor are we a large corporation such as he is looking for.

AF 102. In response to the followup questionnaire Mr. Cerami agreed that he had an interview with Employer, but said that the Employer did not offer this position to him. Saying that the job was advertised at $38,675 per year, Mr. Cerami added that during the interview he and the Employer apparently agreed to a salary of $35,000.00 per year. AF 112. Obviously, Mr. Cerami's notion of the amount of the salary Employer's advertisement had offered was wrong, since the Employer clearly had advertised a monthly salary of $2975.00 or $35,700.00 per year. While Mr. Cerami's statement indicated that Employer had clarified its salary offer during their interview, his statement also indicates that the job was not offered to him.

While the Employer argues that Mr. Cerami rejected the job offer, the Employer's initial statements that they were unable to offer a salary of $39,000 and that it is not a large corporation are more consistent with Mr. Cerami's statement that the job was not offered to him. For these reasons it is inferred that the Employer construed Mr. Cerami's confusion during the interview as to the amount of the salary offered to be a rejection of the job, which it did not offer to him. Thus Mr. Cerami was not allowed the opportunity to reject the job offer based on the salary it stated in its recruiting advertisement.

This omission by the Employer is significant because the Board has held that an employer may reject an applicant as unwilling to accept the salary offered only after the position has been offered to the applicant at the salary advertised. **Impell Corp.**, 88 INA 298 (May 31, 1989)(en banc). An employer's belief that the applicant would be unwilling to accept the salary is insufficient to support the rejection of the U. S. applicant. **Palacio Metal Works,** 90 INA 396 (Mar. 27, 1991). Consequently, to establish that an applicant is unwilling to accept the job the employer must first establish that (1) the position at issue was offered to the applicant and (2) the position was refused by the applicant based on the salary.

Although the Employer has argued that the job was offered to Mr. Cerami, that fact is not proven by the evidence of record. To the contrary, the Employer's initial statement and the statement of Mr. Cerami indicate Employer assumed this applicant would reject the job offer because of the salary offered. On the other hand, the Board has consistently held that where applicant expresses a desire for a higher salary, the employer is required to offer applicant the position and to allow the applicant the opportunity to reject the offer. **Kaprielian Enterprises,** 93 INA 193 (Jun. 13, 1994). Since the Employer did not demonstrate that it actually offered the job to Mr. Cerami and that he rejected the job offer, it is found that the Employer has failed to prove that this U. S. worker was unwilling to accept the job offer. Consequently, it is concluded that the CO correctly found that the Employer rejected a U.S. applicant for reasons which are contrary to 20 CFR § 656.21(b)(6). It follows that certification should be denied.

Accordingly, the following order will enter.

ORDER

The Certifying Officer's denial of labor certification is hereby Affirmed.

For the Panel:

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FREDERICK D. NEUSNER
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five, double-spaced, typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition and shall not exceed five, double-spaced, typewritten pages. Upon the granting of the petition the Board may order briefs.

BALCA VOTE SHEET

Case No. 95 INA 660

ANTARES CHARTERING & SHIPPING, INC., Employer
SLOBODAN TODOROVIC, Alien

PLEASE INITIAL THE APPROPRIATE BOX.

	CONCUR	DISSENT	COMMENT
Holmes			
Huddleston			

Thank you,

Judge Neusner

Date: August 18, 1997